

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

March 26, 1996

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 94-3257

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

**Terry DeMario and
Jan DeMario,**

Plaintiffs-Respondents,

**Family Health Plan Cooperative,
a Wisconsin insurance corporation, and
Compcare Health Services, Ins. Corp.,
a Wisconsin insurance corporation,**

Involuntary-Plaintiffs-Respondents,

v.

**Donald J. Zoltan, M.D.,
Physicians Insurance Company of Wisconsin, Inc.,
a Wisconsin insurance corporation, and
Wisconsin Patients Compensation Fund,**

Defendants-Appellants.

APPEAL from a judgment of the circuit court for Milwaukee County: JOHN E. McCORMICK, Judge. *Affirmed in part; reversed in part and cause remanded with directions.*¹

Before Sullivan, Fine and Schudson, JJ.

PER CURIAM. Donald J. Zoltan, M.D., and his insurer appeal from a judgment of the circuit court awarding damages to Terry and Jan DeMario for injuries sustained by Mr. DeMario while under Dr. Zoltan's care. On appeal, Dr. Zoltan argues that: (1) the jury's answer to two verdict questions should be changed because the answers are not supported by any credible evidence; (2) a new trial should be awarded because the special verdict improperly advised the jury of the effect of their answers; (3) a new trial should be granted because erroneous and prejudicial jury instructions were given; (4) a new trial should be awarded or a remittitur should be given due to an excessive damages award; (5) photographs of Mr. DeMario's knee were prejudicial and should have been excluded; and (6) a new trial should be awarded pursuant to § 752.35, STATS.

Mr. DeMario came under the care of Dr. Zoltan on July 3, 1987, for the diagnosis and treatment of pain in his right knee. Dr. Zoltan diagnosed "right knee chondromalacia of the patella with subluxation." Dr. Zoltan recommended arthroscopic surgery. The surgery was performed by Dr. Zoltan on March 3, 1988. Mr. DeMario's complaint alleged that during the course of the procedure, Dr. Zoltan negligently severed a tendon in Mr. DeMario's right knee and that he failed to then fix the problem. Mr. DeMario alleges that as a result of this malpractice, he has suffered permanent injuries. The jury found Dr. Zoltan negligent and awarded damages totalling \$306,000.

1. Change of Verdict

¹ Family Health Plan Cooperative and Compcare Health Services, Insurance Corporation, did not participate in this appeal.

Dr. Zoltan argues that the negligence and causation questions on the verdict form should be changed from “yes” to “no” because they are not supported by any credible evidence. We disagree.

We will sustain the jury's verdict if there is any credible evidence to support it. *Radford v. J.J.B. Enters., Ltd.*, 163 Wis.2d 534, 543, 472 N.W.2d 790, 794 (Ct. App. 1991). This is especially true when the verdict has the approval of the trial court. *Fehring v. Republic Ins. Co.*, 118 Wis.2d 299, 305, 347 N.W.2d 595, 598 (1984). On review, we look at the facts in the light most favorable to sustain the verdict and, where more than one inference might be drawn from the evidence presented at trial, we are bound to accept the inference drawn by the jury. *Gonzalez v. City of Franklin*, 137 Wis.2d 109, 134, 403 N.W.2d 747, 757 (1987).

The jury's findings of causation and negligence are supported by ample evidence. At trial, Dr. Clifford Raisbeck testified on behalf of Mr. DeMario, stating that Dr. Zoltan negligently severed Mr. DeMario's quadriceps tendon and then failed to treat it. He based his opinion on a review of all the medical records relating to Mr. DeMario's treatment, including an MRI and his physical examination of Mr. DeMario. On his examination, Dr. Raisbeck found that the “entire quadriceps tendon is absent at the patella and retracted.”

Although Dr. Zoltan does not appear to dispute all of Dr. Raisbeck's testimony, he does take issue with an MRI scan of Mr. DeMario's knee obtained five years after the tendon was severed. Dr. Zoltan suggests that the MRI shows a different type of defect in the knee that was not addressed by Dr. Raisbeck. Dr. Zoltan admitted in his trial testimony, however, that the MRI was not conclusive as to the nature of cut he made into the tendon. There was ample evidence to sustain the jury's verdict on the negligence and causation questions.

2. Form of the Verdict

Dr. Zoltan claims that the jury was advised of the effect of their answer because of the form of the special verdict submitted to the jurors. Dr. Zoltan requested that damage questions be answered regardless of how the jury

answered the causation question. The trial court rejected Dr. Zoltan's request and instructed the jury to answer Dr. Zoltan's damage questions only if they found causation.

Generally, the form of the special verdict question is left to the trial court's discretion and a reviewing court will not interfere if the questions cover the issues. *Dahl v. K-Mart*, 46 Wis.2d 605, 609, 176 N.W.2d 342, 344 (1970). This court will not interfere with the form of a special verdict unless the question, taken with the applicable instruction, does not fairly present the matter at issue of fact to the jury for determination. *In Interest of A.E.*, 163 Wis.2d 270, 276, 471 N.W.2d 519, 521 (Ct. App. 1991).

Ordinarily, it is reversible error to inform the jury of the effect of their answer or result of their verdict. *McGowan v. Story*, 70 Wis.2d 189, 196, 234 N.W.2d 325, 328 (1975). Under the facts of this case, however, the trial court was within its discretion in limiting the jury's award of damages to those that were suffered as a result of Dr. Zoltan's negligence because his defense raised a question as to whether Mr. DeMario's damages were caused by the negligence of Dr. Zoltan or whether they resulted from an underlying pre-existing condition for which he sought treatment. Given this defense theory, a direction to answer the damages question without regard to the jury's answers to the negligence and causation questions posed a significant risk of prejudicially inflating any damage award.

3. Jury Instructions

Dr. Zoltan claims that the trial court gave erroneous and prejudicial jury instructions. He claims that the trial court should have: (1) instructed the jury to exclude damages that resulted from Mr. DeMario's original knee condition; (2) instructed the jury as to Mr. DeMario's contributory negligence; (3) given his proposed mitigation of damages instruction; (4) refused the circumstantial evidence instruction given by Mr. DeMario; and (5) given his proposed alternative methods of treatment instruction. We agree that the trial court did not adequately instruct the jury on mitigation, and, therefore, do not address the other jury-instruction issues regarding damages. *See Gross v. Hoffman*, 227 Wis. 296, 300, 277 N.W. 663, 665 (1938) (only dispositive issue need be addressed).

Trial courts have broad discretion when instructing a jury and a challenge to an allegedly erroneous instruction requires reversal if the error was prejudicial. *Fischer v. Ganju*, 168 Wis.2d 834, 849, 485 N.W.2d 10, 16 (1992). An error is prejudicial if it “probably” misled the jury. *Id.*, 168 Wis.2d at 850, 485 N.W.2d at 16. Dr. Zoltan requested that a mitigation of damages instruction, Wis JI—CIVIL 1730, be charged to the jury:

A person who has been injured must use ordinary care to mitigate or lessen the person's damages. This duty to mitigate damages requires an injured person to use ordinary care to seek medical and surgical treatment and to submit to and undergo recommended medical or surgical treatment within a reasonable time to minimize the damage from physical injury.

An injured party must use reasonable care to promote recovery. *See Lopez v. Prestige Casualty Co.*, 53 Wis.2d 25, 32, 191 N.W.2d 908, 912 (1971) (affirming low award of damages for pain and suffering based on evidence that plaintiff was dilatory in seeking follow-up treatment). Although no injured person is required to undergo treatment that is harmful, one injured by the wrongful conduct of another is obliged to exercise reasonable care to minimize damages including following the advice of a physician. *Lobermeier v. General Tel. Co.*, 119 Wis.2d 129, 148-149, 349 N.W.2d 466, 475-476 (1984). If a plaintiff elects neither to seek medical care nor to follow medical directives, damages for future pain and suffering or other disability can be diminished. *Id.*

We agree with Dr. Zoltan that the trial court should have presented an instruction on mitigation of damages to the jury. Dr. Zoltan presented evidence that indicated that Mr. DeMario failed to follow-up for treatment and failed to follow Dr. Zoltan's directives on physical therapy. Dr. Zoltan also presented evidence that Mr. DeMario was unhappy with his progress after surgery; that he was in pain; that he had trouble moving his right leg; that he noticed that his right thigh was “wasting away”; and, that he could see a hole above his right knee cap. Mr. DeMario's own expert testified that if he had returned for his follow-up visits, Dr. Zoltan could have detected the defect and then would have had an opportunity to fix the problem. It is apparent that the defense's theory was that Mr. DeMario did not give Dr. Zoltan

an opportunity, after these symptoms appeared, to treat him properly. Given this theory and the evidence presented by Dr. Zoltan, along with Mr. DeMario's allegation that Dr. Zoltan failed to properly fix the severed tendon, the mitigation instruction should have been given.

The trial court's failure to give a mitigation of damages instruction left the jury without guidance on how to evaluate the evidence that Mr. DeMario did not follow the prescribed course of post-operative treatment. Dr. Zoltan was entitled to have the jury consider, in mitigation of damages, whether Mr. DeMario was negligent with respect to his own care subsequent to the alleged malpractice. Dr. Zoltan, therefore, is entitled to a new trial limited to the issues of damages only.

Next, Dr. Zoltan argues that the trial court should not have given the circumstantial evidence instruction contained in WIS J I—CIVIL 230. Dr. Zoltan does not offer any citation to authority for his argument and, therefore, we decline to consider it. See *State v. Pettit*, 171 Wis.2d 627, 646–647, 492 N.W.2d 633, 642 (Ct. App. 1992) (appellate court need not consider arguments unsupported by citation to authority).

Dr. Zoltan also argues that the trial court should have given his proposed instruction regarding alternative methods of treatment found in WIS J I—CIVIL 1023, which reads in part:

If you find that more than one method of treatment for Terry DeMario's injuries is recognized, then Dr. Zoltan was at liberty to select any of the recognized methods. Dr. Zoltan was not negligent merely because he made a choice of a recognized alternative method of treatment if he used the required care, skill and judgment in administering the method. This is true even though other medical witnesses may not agree with him on the choice that was made.

We conclude that the trial court correctly excluded this instruction because the issue before the jury was whether Dr. Zoltan negligently performed the treatment he chose, not whether he negligently chose a course of treatment.

4. *Photographs*

Dr. Zoltan argues that the trial court committed prejudicial error in admitting certain photographs of Mr. DeMario's right knee into evidence because they were cumulative, misleading and deceptive.

Whether photographs should be viewed by the jury is left within the sound discretion of the trial court. *State v. Hagen*, 181 Wis.2d 934, 946, 512 N.W.2d 180, 184 (Ct. App. 1994). We will not disturb the court's decision "unless it is wholly unreasonable or the only purpose of the photographs is to inflame and prejudice the jury." *Id.* We have viewed the photographs and do not find them misleading or deceptive. The photographs show a leg with a dent above the knee-cap, as well as a scar. We conclude that the photographs were probative with regard to whether Mr. DeMario suffered bodily harm, as well as the nature and extent of his injuries. Although the photographs may be somewhat cumulative of the testimony of witnesses, the photographs aid the jurors in understanding witness testimony. The probative value of the photographs was not "substantially outweighed by the danger of unfair prejudice." See RULE 904.03, STATS. The trial court did not erroneously exercise its discretion when it permitted the jury to see the photographs.

5. *Excessive Awards and New Trial/Remitter*

Dr. Zoltan claims that a new trial should be granted due to the cumulative effect of error regarding the special verdict, jury instructions and certain evidentiary rulings. Our grant of a new trial on damages renders these issues moot.

The judgment is reversed and a new trial is granted as to damages only.

By the Court.—Judgment affirmed in part; reversed in part and cause remanded with directions.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.